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No. 07-303

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In the
Supreme Court of the United States

MICHAEL TAYLOR,
Petitioner,

v.

LARRY CRAWFORD, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Crime

This case began in 2005 when Taylor filed a complaint pursuant to 42 U.S.C. § 1983. But its history stretches back to his 1989 crime, described by the Missouri Supreme Court:

> ...Taylor and a companion, Roderick Nunley, spent the night of March 21, 1989, driving a stolen Chevrolet Monte Carlo, stealing "T-tops," smoking marijuana and drinking wine coolers. At one point during the early morning hours of March 22, they were followed by a police car, but lost the police after a high speed chase on a highway. About 7:00 a.m., they saw fifteen-year-old Ann Harrison waiting for the school bus at the end of her driveway. Nunley told Taylor, who was driving at the time, to stop so Nunley could snatch her purse. Taylor stopped the car, Nunley got out, pretended to need directions, grabbed her and put her in the front seat between Taylor and Nunley. Once in the car, Nunley blindfolded Ann with his sock and threatened to stab her with a screwdriver if she was not quiet. Taylor drove to Nunley's house and took Ann to the basement. By this time her hands were bound with cable wire. Nunley removed Ann's clothes and had forcible sexual intercourse with her. Taylor then had forcible intercourse with her. They untied her, and allowed

her to dress. Ann tried to persuade them to call her parents for ransom, and Nunley indicated he would take her to a telephone to call home. They put the blindfold back on her and tied her hands and led her to the trunk of the Monte Carlo. Ann resisted getting into the trunk until Nunley told her it was necessary so she would not be seen. Both men helped her into the trunk.

Nunley then returned to the house for two knives, a butcher knife and a smaller steak knife. Nunley argued with Taylor about whether to kill her. Nunley did not want Ann to be able to testify against him and emphasized he and Taylor were in this together. Nunley then attempted to slash her throat but the knife was too dull. He stabbed her through the throat and told Taylor to "stick her." Nunley continued to stab, and Taylor stabbed Ann "two or three times, probably four." He described how "her eyes rolled up in her head, and she was sort to like trying to catch her, her breath."

Nunley and Taylor argued about who would drive the Monte Carlo, and Nunley ended up driving it following Taylor who was driving another car. Taylor picked up Nunley after he abandoned the Monte Carlo with Ann Harrison in the trunk. They returned to Nunley's house where Nunley

disposed of the sock, the cable wire, and the knives.

When the school bus arrived at the Harrison home to pick up Ann, the driver honked because she was not there. Mrs. Harrison looked out of the window and noticed Ann's purse, gym clothes, books, and flute lying on the driveway. She waved for the bus to go on and began to look for her daughter. Police quickly mounted a ground and air search. Ann Harrison's body was discovered the evening of March 23rd when police found the abandoned Monte Carlo and a friend of the car's owner opened the trunk.

The State's physical evidence included hair matching Taylor's collected from Ann Harrison's body and the passenger side of the Monte Carlo, hair matching Ann's collected from Nunley's basement, sperm and semen belonging to Taylor found on Ann's clothes and body. An autopsy revealed a lacerated vagina, six stab wounds to Ann's chest, side, and back which penetrated her heart and lungs, and four stab wounds to her neck. The medical examiner testified Ann Harrison was alive when all the wounds were inflicted and could have remained conscious for ten minutes after the stabbing. She probably lived thirty minutes after the attack.

State v. Taylor, 929 S.W.2d 209, 214 (Mo. banc 1996) (footnote omitted).

The History of the Criminal Case

Taylor was charged in the Circuit Court of Jackson County, Missouri, with murder in the first degree, armed criminal action, kidnapping, and forcible rape. On February 8, 1991, he appeared with his attorneys before the court and expressed his desire to enter a plea of guilty to these charges in open court and on the record pursuant to Missouri Supreme Court Rule 27.01(b). After a three-day punishment phase hearing, the court sentenced Taylor to death for murder, and to consecutive prison terms for the other crimes.

Taylor brought a post-conviction action pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and sentence. After an extensive evidentiary hearing, the circuit court denied Taylor's post-conviction motion.

Taylor filed a consolidated appeal to the Missouri Supreme Court, challenging the guilty plea, sentence, and denial of post-conviction relief and arguing some fifteen claims of error. The Missouri Supreme Court issued the following order on June 29, 1993:

> ORDER
>
> Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.

Taylor's second punishment phase hearing began before a different judge on May 2, 1994. The court heard evidence for three days, then allowed Taylor to present the testimony of additional witnesses on two additional days, ending June 6, 1994. The State adduced evidence concerning the abduction and murder of Ann Harrison. Taylor called ten witnesses in purported mitigation of punishment.

On June 17, 1994, over three years after he had first received the penalty of death, Taylor appeared for formal sentencing. In oral and written findings, the trial court found, beyond a reasonable doubt, six statutory aggravating circumstances and three non-statutory aggravating circumstances. The trial court found the existence of one mitigating circumstance, rejecting several others offered by Taylor, and concluded that the mitigating circumstance did not outweigh the aggravating circumstances, making the sentence of death appropriate. The trial court also sentenced Taylor to fifty years for armed criminal action, fifteen years for kidnapping, and life imprisonment for rape, all terms to run consecutively.

Taylor appealed. He also sought post-conviction relief under Missouri Supreme Court Rule 24.035. This time, again on consolidated appeal, the Missouri Supreme Court affirmed. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996), *cert. denied*, 519 U.S. 1152 (1997).

Taylor petitioned for a writ of habeas corpus in the United States District Court for the Western District of Missouri. The district court denied the petition; the court of appeals affirmed. *Taylor v.*

Bowersox, 329 F.3d 963 (8th Cir. 2003), *cert. denied*, 541 U.S. 947 (2004).

On January 3, 2006, the Missouri Supreme Court set February 1, 2006, as Taylor's execution date.

The History of this § 1983 Case

Meanwhile, Taylor began this litigation with a June 3, 2005 complaint, which he amended on September 12, 2005. He requested preliminary injunctive relief, declaratory relief, and a permanent injunction against his execution by means of Missouri's lethal injection procedure, challenging the constitutionality of Missouri's execution process.

On January 19, 2006, in light of the recently set execution date, the district court granted Taylor's application for an order prohibiting his execution. Respondents appealed, and on January 29, 2006, the court of appeals vacated the stay in part and remanded the cause for further proceedings.

The district court held a two-day evidentiary hearing. The court found Taylor's claims meritless and entered judgment in favor of Respondents on January 31, 2006. Taylor immediately filed a notice of appeal. On February 1, 2006, a panel of the court of appeals denied Taylor's request for stay of execution, but the en banc court issued a stay. This Court declined to vacate that stay. *Crawford v. Taylor*, 546 U.S. 1161 (2006).

On April 27, 2006, the court of appeals remanded the cause to the district court for further proceedings. *Taylor v. Crawford*, 445 F.3d 1045 (8th

Cir. 2006. After extensive discovery, the district court held a two-day supplemental hearing in June, 2006. On June 26, 2006, the district court issued its order amending its January 31, 2006 order (Pet. App. 27a). It required Respondents to submit a "written protocol for the implementation of lethal injection" by July 15, 2006 (Pet. App. 42a, 44a). Respondents submitted a written protocol on July 14, 2006 (Pet. App. 45a; Resp. App. A-1), but also appealed the June 26, 2006 order as a precaution. The district court concluded it no longer had jurisdiction. The court of appeals remanded the case to the district court for consideration of the written protocol and all other issues (Pet. App. 45a). *Taylor v. Crawford*, 457 F.3d 902 (8th Cir. 2006).

On September 12, 2006, the district court found the written protocol constitutionally insufficient and directed Respondents to submit a revised protocol (Pet. App. 46a, 48a). In response, Respondents maintained that the protocol did comply with the Eighth Amendment and asked the court to reconsider. On October 16, 2006, the district court declined to reconsider its order and entered judgment against Respondents, who then appealed.

The court of appeals reversed the judgment of the district court. The court of appeals concluded that use of the written protocol would not create a "substantial foreseeable risk of the wanton infliction of pain" (Pet. App. 17a). The decision of the panel was unanimous (Pet. App. 1a), and the court of appeals unanimously denied rehearing and rehearing en banc on August 7, 2007 (Pet. App. 49a).

The Lethal Injection Procedures

In the course of the proceedings in this case, the State and Taylor created a record as to the Missouri's lethal injection procedure. The procedure, as established at the time Taylor filed suit in 2005 was described in detail in interrogatory responses from Respondent Crawford that were admitted into evidence at the June 2006 hearing. After the condemned is brought into the execution room, a doctor sets an IV catheter in the condemned's femoral vein (Court of Appeals Appendix – hereinafter CA App. 813). Once the catheter is in place, the doctor injects flush solution through the tube into the vein to make sure the line flows freely (CA App. 813). After the IV is in place and its flow checked, the Director of the Department of Corrections directs that the execution begin (CA App. 820). The Director does not give this order until he receives word that the Governor has declined to exercise clemency and that the courts have declined to order a stay (CA App. 820).

After the order to proceed, prison officers inject five grams of thiopental prepared in a 60 cc solution into the IV tubing leading to the femoral catheter set by the doctor (CA App. 820). Then 30 cc of flush is injected to clear the line (CA App. 820). After the flush, 60 cc of pancuronium bromide is injected. Next, another 30 cc of flush is injected to clear the line (CA App. 820). After this flush, 240 milliequivalents of potassium chloride is injected (CA App. 820). Finally, 60 cc of flush is injected (CA App. 821). The entire process of injection of the chemicals and the flush takes approximately two to four minutes (CA App. 821).

Once all the chemicals are administered, the doctor monitors an electrocardiogram machine and determines death when all electrical activity of the hearts ends (CA App. 814, 821). The time from injection of the first chemical to death, as shown by complete cessation of electrical activity in the heart, is from two to five minutes (Jan. 31 Tr. 72-73; CA App. 804).

The thiopental renders the condemned sufficiently unconscious to be unable to experience pain (CA App. 391 ¶5). Dr. Mark Dershwitz, the expert presented by Respondents, testified that by the time five grams of this chemical are injected, over 99.99999999% of the population would be unconscious (CA App. 392 ¶8). He also testified that there is only an approximately 0.000000006% probability that a condemned prisoner given this amount would be conscious and able to experience pain after five minutes (CA App. 393 ¶9). Dr. Dershwitz calculated the same probability of consciousness after 10 minutes at approximately 0.0000015%, after 30 minutes at 0.000021%, and after 60 minutes at 0.00047% (CA App. 393 ¶¶10-12). According to Dr. Dershwitz, most people receiving five grams of thiopental would be unconscious in excess of seven hours, assuming they were able to continue breathing (CA App. 393 ¶13).

The injection of pancuronium bromide will cause complete paralysis within a few minutes (Jan. 30 Tr. 27). The pancuronium bromide will prevent seizure activity during an execution and thereby result in a more peaceful and dignified death (CA App. 797). Administration of potassium chloride in the amount used in Missouri executions will quickly stop the heart (Jan. 30 Tr. 29).

The doctor who had assisted in previous executions, referred to in this litigation as Dr. Doe, had difficulty in recent executions in mixing a 60 cc solution containing five grams of thiopental because of a change in packaging (CA App. 643-47, 672-75). As a result, he prepared solutions that contained 2.5 grams of thiopental (CA App. 647-53, 664-65, 675). He thus reduced the standard amount of thiopental at his own discretion, believing he had authority to do so based on his long experience assisting at executions (CA App. 526; June Tr. 341-42, 367-68). Based on his medical knowledge and experience, he determined that the lesser amount would still be more than sufficient to render the condemned deeply unconscious and unable to experience any pain (CA App. 627-28, 629, 676, 687).

Taylor's expert, Dr. Thomas Henthorn, confirmed that as little as 1.67 grams of thiopental, which is still several times more than the usual clinical dose used during surgeries, will result in a deep state of unconsciousness in almost everyone (June Tr. 233, 241-42, 301). Dr. Henthorn also testified that the large amount of thiopental used in executions will remain effective for 45 minutes to hours (June Tr. 245-46).

When the Director of the Department of Corrections learned during proceedings in this case (but before the district court ordered a new written protocol) that the doctor who had assisted at previous executions had not used the prescribed five grams of thiopental, he was extremely concerned that the doctor had not reported the change in the amount of thiopental used (June Tr. 366-67). Though he understood, as Dr. Dershwitz confirmed in his testimony, that 2.5 grams was still about six

times the amount normally given for surgery, the Director determined to prepare a directive to make the approved protocol explicit and to insure that changes in the amounts of chemicals used would occur only with his approval (June Tr. 301, 368-74). The planned directive also included an auditing process (June Tr. 373-74). Before any further executions, the Director planned to meet with his staff, including the doctor, to explain the contemplated directive (June Tr. 374). The Director would emphasize that changes in the amount of chemicals used required his advance approval (June Tr. 371-74).

After the June 2006 hearing and the district court's June 26, 2006 direction to submit a written protocol, Respondents prepared a written protocol for the court's review (Resp. App. A1 – hereinafter Protocol). In summary, the protocol requires a physician, nurse, or pharmacist to prepare the chemicals used during the lethal injection (Protocol, ¶A.2). A physician, nurse, or emergency medical technician (EMT) inserts the intravenous lines, monitors the condemned, and supervises the injections of chemicals by non-medical members of the execution team (Protocol, ¶A.3). The protocol requires administration of five grams of thiopental in 200 cc of solution (Protocol, ¶B.2, ¶E.2), a 30 cc saline flush (Protocol, ¶B.3, ¶E.2), 60 mg. of pancuronium bromide in a 60 cc solution (Protocol, ¶B.4, ¶E.6), a 30 cc flush (Protocol, ¶B.5, ¶E.7), and 240 milliequivalents of potassium chloride (Protocol, ¶B.6, ¶E.8), all followed by a 60 cc flush (Protocol, ¶B.7, ¶E.9).

Following administration of thiopental, medical personnel examine the condemned to

confirm that he is unconscious (Protocol, ¶E.3). In the unlikely event the condemned is still conscious, more thiopental is administered (Protocol, ¶E.4), and then the condemned is examined for consciousness (Protocol, ¶E.4).

Once the condemned is unconscious and three minutes have lapsed from the start of the injection of thiopental, the remaining chemicals are injected (Protocol, ¶E.5). If the condemned's heart does not cease activity within five minutes, additional potassium chloride is injected to cause death (Protocol, ¶E.10). When electrical activity of the heart ceases, medical personnel pronounce death (Protocol, ¶E.11). Finally, there are procedures to document the chemicals used during the execution process (Protocol, ¶F).

* * *

Some specific comments are warranted about the statements made by Taylor in his statement of the case. Much of the statement casts aspersions on John Doe 1, the doctor who assisted at previous executions (Pet. 2-6). That criticism is moot because of the adoption by the Department of Corrections of the written protocol and the Department's decision not to use the services of Dr. Doe (Pet. App. 8a n.3).

Furthermore, even though Respondents have decided not to continue to use Dr. Doe's services, it is important to note that, after "very carefully" examining the record, the court of appeals unanimously found "no evidence to indicate that any of the last six inmates executed [discovery was conducted with regard to the last six executions] suffered any unnecessary pain that would rise to an Eighth Amendment violation or that any state actor

was deliberately indifferent" (Pet. App. 23a). This finding, together with the evidence presented at trial refutes Taylor's assertions that the medical and departmental personnel involved in carrying out executions are incompetent and that the Department of Corrections has acted with disregard to the humaneness of its lethal injection procedure.

RESPONSE TO REASONS TO GRANT PETITION

1. On September 25, 2007, this Court granted a petition for writ of certiorari in a lethal injection case arising from Kentucky, *Baze v. Rees*, No. 07-5439. In his petition, Baze requests that the Court reconcile divergent opinions by lower courts[1] concerning the legal standard by which to measure a claim that lethal injection violates the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution. But for the grant of certiorari review in *Baze*, this brief in response to Taylor's petition for writ of certiorari would have been a simple opposition, pointing out that even if there were a conflict among the circuits, it would not affect this case.

In this case, the court of appeals created and applied a pro-capital-plaintiff standard of review that required Taylor to show only "a substantial foreseeable risk of the wanton infliction of pain"

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[1] These opinions are "divergent" only in the sense they diverge from well-settled precedents from this Court that prohibit punishment only if it involves unnecessary and wanton infliction of pain. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

inherent to a protocol,[2] or an intent to harm or deliberate indifference if there is a deviation from the official protocol (Pet. App. 16-17a). Notwithstanding its adoption of such a lenient standard by which a plaintiff could show an Eighth Amendment violation, the court of appeals concluded that Taylor failed to show such: "We conclude that Missouri's written lethal injection protocol does not violate the Eighth Amendment"[3] (Pet. App. 24a). And that legal conclusion is supported by substantial evidence from the record, as articulated by the court of appeals in its decision (Pet. App. 17-22a), and by Respondents in their statement of facts.

Respondents recognize that the grant of review in *Baze* changed the legal landscape, *see also Turner v. Texas*, No. 07A272 (U.S. Sept. 27, 2007) (granting stay of execution); and the Court is unlikely to issue a simple denial of the current petition for writ of certiorari. If the Court does not grant or deny the petition immediately, it is likely to hold the petition for re-conferencing after it decides *Baze*. But a decision in *Baze* may not clearly resolve all the issues raised by Taylor. And if it does not, there is little doubt that Taylor will pursue whatever issues remain. A final resolution of this case would thus be delayed for months as Taylor re-asserts those

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[2] Taylor omits from the appendix to his petition the written lethal injection protocol that he claims will violate his Eighth Amendment rights. It is republished in Respondents' Appendix at A-1.

[3] Taylor criticizes the court below for upholding the lethal injection protocol used by Missouri before the adoption of the July 14, 2006 protocol (Pet. 21-25). The court below made no such holding. Only the constitutionality of the July 14, 2006 protocol was raised to the court below, and that court ruled only as to that protocol (App. 24a).

issues in the court of appeals and tries once again to persuade this Court to grant review.

2. *Baze* and this case have much in common, including similar legal issues and well developed records. But the cases are not identical, either in terms of the facts, the records, or the arguments preserved for review by this Court. Three differences stand out.

First, the amount of the first chemical used, thiopental, differs between Kentucky and Missouri. In Kentucky, the government administered three grams of thiopental. *Baze v Rees*, 217 S.W.3d 207, 212 (Ky. 2006). In contrast, in Missouri, five grams is administered (Pet. App. 20a). There is also physical confirmation of unconsciousness and a three-minute pause[4] before administration of the last two chemicals in Missouri that does not appear to be part of the Kentucky process (Pet. App. 22a). If the offender is within, that infinitesimally small fractional percentage that may be conscious after the administration of five grams of thiopental, an additional five grams of thiopental is administered with another physical examination before the second and third chemicals are administered (Pet. App. 22a).

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[4] Taylor's initial theory was that the Missouri lethal injection was too slow, creating a possibility that the thiopental wore off quickly (Affidavit of Srikumaran Melethil of 2/01/06, p. 3, ¶10). But at the June 12, 2006 evidentiary hearing, his theory became that the lethal injection was too fast, and a pause between administration of thiopental and the subsequent two chemicals was necessary in order for the thiopental to have time to affect the brain. Which theory he currently espouses cannot be determined from the petition.

A second difference between this case and *Baze* arises from the court of appeals' two requirements for a constitutional execution: No substantial foreseeable risk of the wanton infliction of pain inherent to a protocol and no intent to harm or deliberate indifference if there is a deviation from the protocol (Pet. App. 16-17a). The question in *Baze* may resolve the legal criteria for the first requirement, but will not resolve issues related to the second. That is already the subject matter of yet more litigation (Pet. 13 n.10). And Taylor has announced his perspective on the requirement; he should always prevail because once he articulates any risk that is not covered by the protocol, the State is deliberately indifferent to that risk (Pet. 28 n.17). That unique perspective may not be resolved in *Baze*. And it seems likely, if not certain, that Taylor will continue to litigate it regardless of how this Court resolves the conflict Taylor sees among the circuits as to the legal standard to be applied.

A third difference between this case and *Baze* concerns Taylor's specific challenges to the qualifications of the personnel at the execution. There are differences between the two States' requirements. Kentucky uses "[c]ertified phlebotomists and emergency medical technicians" *Baze v Rees*, 217 S.W.3d at 212. In Missouri, the personnel may be a physician, a pharmacist, a nurse, or an emergency medical technician (EMT-Intermediate or-EMT- paramedic) (Protocol, ¶¶A2-A3). The medical qualifications became a key part of Taylor's arguments and of the district court's decision.

The district court concluded that the Eighth Amendment requires "a physician with training in

the application and administration of anesthesia to either mix the chemicals or oversee the mixing of the chemicals for lethal injection" (Pet. App. 46a). The district court also found that a Missouri execution must have "a physician trained in the administration and application of an anesthetic drug to be involved" (Pet. App. 47a). The court of appeals disagreed, concluding that "there is no need for the continuing careful, watchful eye of an anesthesiologist or one trained in anesthesiology, whose responsibility in a hospital's surgery suite (as opposed to an execution chamber) is to ensure that the patient will wake up at the end of the procedure" (Pet. App. 21a). The Kentucky Supreme Court, by contrast, did not address qualifications – indeed, it appears that the question never arose there, though in light of the district court's decision here, it will most certainly be raised in state after state until it is definitively resolved.

Certainly there is no reason to believe that Taylor will abandon it, in the absence of a decision on point by this Court. In his petition, he articulates his desire to further litigate the qualifications of the medical personnel as part of the question whether there is an "unreasonable risk" of pain (Pet. 27). Taylor suggests that the Eighth Amendment requires an execution team have personnel with formal training in anesthesiology (Pet. 27). Again, there is nothing in the petition or the lower court's decision in *Baze* suggesting that overreaching of the sort undertaken by the district court here, supported by Taylor in his petition, will necessarily be resolved in the Kentucky case.

Accordingly, even after the Court resolves Baze, it is highly likely that Taylor will reassert his

demands for certiorari – as to the execution team qualifications or deliberate indifference, if Kentucky prevails; or as to the significance of the five gram amount of thiopental, if Baze prevails. This possibility leads Respondents to do something that they normally would not do: to suggest that if the Court is unwilling to immediately deny Taylor's petition (and thus permit the 1994 sentence to finally be carried out), to grant Taylor's petition. Should the Court do so, Respondents join Taylor's commitment to conform to the briefing schedule issued for *Baze*.

CONCLUSION

For the foregoing reasons, the Court should deny the petition. But if the alternative is to await a decision in *Baze v. Rees*, No. 07-5439, Respondents join the request that the Court grant the petition and schedule the case for argument with *Baze*.

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Protocol..... A-1

PREPARATION AND INJECTION OF CHEMICALS

A. Execution team members

1. The execution team consists of contracted medical personnel and department employees.

2. A physician, nurse, or pharmacist prepares the chemicals used during the lethal injection.

3. A physician, nurse, or emergency medical technician (EMT – intermediate or EMT – paramedic) inserts intravenous lines, monitors the prisoner, and supervises the injection of lethal chemicals by nonmedical members of the execution team.

4. Two department employees inject the chemicals into the prisoner.

B. Preparation of chemicals

1. Medical personnel prepare the lethal chemicals. The quantities of these chemicals may not be changed without prior approval of the department director. Fifteen (15) syringes are prepared and labeled in a distinctive manner as follows.

2. Syringes 1, 2, 3, and 4 each contain 1.25 grams of thiopental (also known as sodium thiopental or sodium pentothal) in a 50 cc solution for a total of 5 grams of thiopental.

3. Syringe 5 contains 30 cc of saline solution.

4. Syringe 6 contains 60 milligrams of pancuronium bromide in a 60 cc solution.

5. Syringe 7 contains 30 cc of saline solution.

6. Syringes 8 and 9 each contain 120 milliequivalents of potassium chloride in 60 cc of solution of a total of 240 milliequivalents of potassium chloride.

7. Syringe 10 contains 60 cc of saline solution.

8. Syringes 1A, 2A, 3A, and 4A each contain 1.25 grams of thiopental (also known as sodium thiopental or sodium pentothal) in a 50 cc solution for a total of 5 grams of thiopental. (These syringes are prepared in the event that additional thiopental must be administered.)

9. Syringe 5A contains 60 cc of saline solution. (This syringe is prepared in the event that additional flush is required.)

C. Intravenous lines

1. Medical personnel determine the most appropriate locations for intravenous (IV) lines. They insert both a primary IV line and a secondary IV line unless the prisoner's physical condition makes it unduly difficult to insert more than one IV. Medical personnel may insert the primary IV line as a peripheral line or as a central venous line (e.g., femoral, jugular, or subclavian) provided they have appropriate training, education, and experience for

that procedure. The secondary IV line is a peripheral line.

2. A sufficient quantity of saline solution is injected to confirm that the IV lines have been properly inserted and that the lines are not obstructed.

D. Monitoring of prisoner

1. Medical personnel attach the leads from the electrocardiograph to the prisoner's chest. Medical personnel check the electrocardiograph to confirm that it is functioning properly.

2. The gurney is positicned so that medical personnel can observe the prisoner's face directly or with the aid of a mirror.

3. Medical personnel monitor the electrocardiograph and the prisoner during the execution.

E. Administration of chemicals

1. Upon order of the department director, the chemicals are injected into the prisoner by the execution team members under the observation of medical personnel. The lights in the execution support room are maintained at a sufficient level to permit proper administration of the chemicals.

2. The thiopental is injected from syringes 1, 2, 3, and 4 (5 grams). The saline solution in syringe 5 (30 cc) is injected.

3. Before the second and third chemicals are injected, medical personnel physically examine the prisoner to confirm that he is unconscious. Medical personnel use standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflex, pupillary responses or diameters, and response to verbal commands and physical stimuli. In addition to examining the prisoner, medical personnel inspect the catheter site(s).

4. In the unlikely event that the prisoner is still conscious, thiopental is injected from syringes 1A, 2A, 3A, and 4A (5 grams) into the secondary IV line. Approximately 30 cc of the saline solution in syringe 5A is injected. Medical personnel confirm that the prisoner is unconscious as directed in paragraph E.3. When the secondary line is used for thiopental, it is also used for the remaining chemicals.

5. After confirming that the prisoner is unconscious, the second and third chemicals are injected provided at least three minutes have elapsed since the execution team members started injecting the thiopental which rendered the prisoner unconscious.

6. The pancuronium bromide in syringe 6 (60 milligrams) is injected into the prisoner.

7. The saline solution in syringe 7 (30 cc) is injected.

8. The potassium chloride in syringes 8 and 9 (240 milliequivalents) is injected.

9. The saline solution in syringe 10 (60 cc) is injected.

10. If the electrical activity of the prisoner's heart does not cease within five minutes, additional potassium chloride is injected to cause death.

11. When all electrical activity of the heart ends as shown by the electrocardiogram, medical personnel pronounce death.

F. Documentation of chemicals

1. Medical personnel properly dispose of unused chemicals.

2. Before leaving ERDCC, all members of the execution team complete and sign the "Sequence of Chemicals" form thereby verifying that the chemicals were given in the order specified in this protocol.

3. Before leaving ERDCC, medical personnel complete and sign the "Chemical Log" indicating the quantities of the chemicals used and the quantities of the chemicals discarded during the execution.

4. Within three days of the execution, the ERDCC superintendent submits the Sequence of Chemicals and the Chemical Log to the director of the Division of Adult Institutions. The DAI division director and the department director review the records. If they do not detect any irregularities, they approve the two documents. If any irregularities are noted, the DAI division director promptly determines whether there were any deviations from this protocol and reports his findings to the department director.

July 14, 2006